APPEAL NO. 93481

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On May 13, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues presented and agreed upon were:

a.Whether Claimant sustained a compensable injury in the course and scope of employment on (date of injury);

b.Whether Claimant timely reported an injury to Employer; and

c.Whether Carrier properly contested compensability of this claim under the Texas Workers' Compensation Act, Tex.Rev.Civ.Stat.Ann. art. 8308-5.21 (Vernon Supp. Pamph. 1993).

The hearing officer determined that claimant did not timely notify his employer that he claimed an injury, that claimant did not have good cause for failure to timely notify employer of his claimed injury and that claimant had not sustained a compensable injury.

Appellant, claimant herein, contends the hearing officer's determinations that claimant was not injured in the course and scope of employment were gratuitous in that carrier had not properly contested compensability and that there are insufficient facts to support the decision that claimant did not report his injury to the employer within the statutory period. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The claimant testified through an interpreter that he was employed by a "grass farm" identified as, employer herein, as a general laborer. Claimant testified that on a Monday--"or maybe Tuesday"--in June 1992 (all dates are 1992 unless otherwise noted), possibly June 22nd, he was injured when a section of a mower fell against him injuring his low back below the waist, legs and neck. Although claimant is not sure of this date, he believes it was on or before June 22nd. Claimant testified that he reported the injury to (Mr. H), one of the employer partners, who was "spraying" in an adjacent field, about 15 minutes after the injury occurred. Claimant asserts he again reported this to Mr. H about two weeks later. Claimant continued to work until July 13th when he suffered non-work-related food poisoning. The next day, July 14th, claimant drove to Mexico. Claimant testified it was during this drive that he realized his back injury was more severe than he thought. Claimant returned from Mexico on July 20th and worked through July 23rd. Mr. H testified that claimant did not report an injury to him until (date).

Mr. H testified that on (date), claimant was late in coming to work and looked very tired. Mr. H said claimant told him he had hurt his back, didn't want to work that day and wanted to see a doctor. Mr. H stated a coworker took claimant to see the doctor. Mr. H also testified that from July 20th, when claimant got back from Mexico, and July 23rd, claimant, after working a full shift, picked up scrap pieces of turf and put them in his pickup for his own use. Mr. H testified that claimant filled the pickup several times with several thousand pounds of turf and that some pieces of turf weighed between 50 and 60 pounds.

(Ms. S), another of employer's partners, testified from employer's records of fertilizing, spraying and rainfall that Mr. H was not on the premises at the time alleged by claimant and that it was raining on the morning of June 22nd when claimant alleged the incident occurred. Mr. H also testified, using photographs of the equipment, that the injury could not have happened as claimant described.

Carrier on "8/27/92" filed a TWCC-21 (Payment of Compensation or Notice of Refused/Disputed Claim) denying compensation because "[i]njury not reported within 30 days . . . . Once investigation is complete an updated controversion will be filed or benefits will be started." Carrier filed another TWCC-21 on "11-05-92" stating "[u]pdated controversion: Injury may not have been reported within 30 days. (Claimant unclear on date of injury.) Injury not reported as claimant alleges . . . . Carrier and employer contend claimant was not injured on the job as alleged." As noted above, one of the issues was whether carrier timely contested compensability of the claim pursuant to Article 8308-5.21.

The hearing officer found, in pertinent part:

FINDINGS OF FACT

5.On or before July 22, 1992, Claimant did not tell or otherwise notify anyone holding a supervisory or management position with Employer that he claimed an injury to any part of his body.

6.Neither Employer nor any person in a supervisory or management position with Employer had actual knowledge of the injury claimed by Claimant on or before July 22, 1992.

10Claimant did not injure his low back, legs and neck from a mower falling against him while he was performing services in furtherance of his Employer's business affairs on or about (date of injury).

CONCLUSIONS OF LAW

3.Claimant did not timely report any injury to Employer.

5.Claimant was not injured in the course and scope of his employment.

Claimant contends "that any findings of fact or conclusions of law that the claimant was not injured in the course and scope of employment are gratuitous and should be stricken from the hearing officer's opinion." Claimant requests that we review the decision on a legal sufficiency basis.

Article 3808-5.21(a) states "[i]f the insurance carrier does not contest the compensability of the injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability." The employer was notified of the alleged injury on (date). The carrier by TWCC-21, dated August 27th, disputed timely reporting of the injury, and conducted an investigation. In a subsequent TWCC-21 dated November 5th, carrier attempted to contest compensability. Carrier did not dispute that the November 5th TWCC-21 was filed more than 60 days after it received notice of the injury, noting that there had been an error in the interpretation of the statute (1989 Act). The hearing officer correctly found the TWCC-21 dated August 27th "contests compensability of the claim only on the issue of timely reporting" and that the TWCC-21st dated November 5th which contested compensability on the issues of timely reporting and existence of the injury "was filed in excess of 60 days after the date on which [carrier] was notified of the injury." Nonetheless, the hearing officer made findings, conclusions and recited in a portion of his decision that claimant had not been injured in the course and scope of his employment. We would agree that in light of the hearing officer's findings and conclusions that carrier had not timely disputed existence of the injury, such finding and conclusion that claimant was not injured in the course and scope of employment is gratuitous. We do not agree, however, that such language needs to "be stricken from the hearing officer's opinion." The hearing officer was, in essence, commenting that he did not believe that claimant was injured in the manner in which he testified. Conceding that the finding and conclusion is gratuitous and surplusage, it does not constitute such error which requires action by the Appeals Panel because of our affirmance of the hearing officer's determination of untimely notice which relieves the employer and carrier of liability under Article 8308-5.02.

Regarding the request for review based on sufficiency of the evidence, we note that claimant is uncertain of the date he was injured. Although claimant testified he notified Mr. H within 15 minutes of the time he was injured, that testimony is refuted by Mr. H, and, further, there is documentary evidence that would indicate that Mr. H was not on the premises on the date(s) claimant states he was injured. Upon review of the record, we are satisfied that the evidence is sufficient to support the challenged findings and conclusions concerning notice of injury. Article 8308-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of the weight and

credibility it is to be given. Claimant had the burden to prove by a preponderance of the evidence that he timely reported his injury. Johnson v. Employer Reinsurance Corporation, 951 S.W.2d 936, 939 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant, and may resolve the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). We will not substitute our judgement for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings Estate, 150 Tex. 662, 244 S.W.2d 660 (1951; Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The hearing officer's decision is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge